

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 May 2014

**Public Authority:** NHS England  
**Address:** 8E02 Quarry House  
Quarry Hill  
Leeds  
LS2 7UE

### Decision (including any steps ordered)

---

1. The complainant has requested copies of all the email messages and reports sent or received by Sir Bruce Keogh in connection with the Leeds Teaching Hospitals NHS Trust from 1 March 2013 to the date of the request. NHS England provided the complainant with the information requested but made redactions under section 22, 31(1)(a) with subsection (2)(d), 38, 40(2), 41 and section 43(2) FOIA. It said that some of the information within the emails and correspondence fell outside the scope of the request and this had not therefore been provided.
2. During the course of the Commissioner's investigation NHS England withdrew its application of section 22 FOIA as the information withheld under this exemption was published and it also withdrew its application of section 38 and section 43(2) FOIA. It also removed some of the redactions originally made under section 40(2) FOIA. It provided the complainant with the information it had originally deemed outside the scope of the request. It did however make some redactions under section 40(2) FOIA to this information.
3. The Commissioner considers that some of the redactions made under section 40(2) FOIA to the information that the Commissioner considers is within the scope of the request should have been made under section

40(1) FOIA. He considers that NHS England was correct to apply section 40(2) and section 41 FOIA to make the remaining redactions other than two emails (numbered 76 and 77). He also considers that NHS England incorrectly applied section 31(1)(g) with subsection (2)(d) FOIA, however section 40(2) FOIA is applicable to this information. As NHS England did not provide the information which could be disclosed with 20 working days of the request being made, it breached section 10 FOIA in relation to its handling of this request.

4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose emails 76 and 77.
5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

---

6. On 8 June 2013 the complainant requested information of the following description:

"Please can I have copies of all the email messages and reports sent or received by Sir Bruce Keogh in connection with the Leeds Teaching Hospitals NHS Trust from 1 March 2013 to the present day?

I would prefer electronic rather than paper copies where possible."

7. On 22 August 2013 NHS England responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:

Section 22  
Section 31  
Section 38  
Section 40  
Section 41  
Section 43

8. The complainant requested an internal review on 22 August 2013. NHS England sent the outcome of its internal review on 21

October 2013. It upheld its original position.

## **Scope of the case**

---

9. The complainant contacted the Commissioner on 21 October 2013 to complain about the way his request for information had been handled.
10. During the course of the Commissioner's investigation NHS England withdrew its application of section 22 FOIA as the information withheld under this exemption was published, it provided the complainant with a link to this information. It also withdrew its application of section 38 and section 43(2) FOIA. It removed some of the redactions originally made under section 40(2) FOIA. It provided the complainant with the information it had originally deemed outside the scope of the request. It did however make some redactions under section 40(2) FOIA to this information. The complainant also highlighted the fact that he had not been provided with a particular letter attached to one of the emails disclosed, NHS England disclosed two further letters in response to the complainant's query.
11. The Commissioner has considered whether NHS England was correct to apply section 31(1)(g) with subsection (2)(d), section 40(2) and section 41 FOIA to the withheld information. He also considered whether section 40(1) FOIA should have been applied to some of the withheld information.

## **Reasons for decision**

---

### **Section 40(1)**

12. Under section 40(1) FOIA the applicant's own personal data is absolutely exempt from disclosure under FOIA.
13. Where the complainant's own name appears within the requested information, this is exempt from disclosure under section 40(1) FOIA.

### **Section 40(2)**

14. Under section 40(2) by virtue of section 40(3)(a)(i), personal data of a third party can be withheld if it would breach any of the data protection principles to disclose it.

15. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

“data which relate to a living individual who can be identified –

(i) from those data, or

(ii) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.”

16. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.

17. The information withheld under section 40(2) FOIA is some of the names and contact details of individuals engaged in the requested correspondence and documentation. The Commissioner also considers that section 40(2) FOIA should have been applied to the information withheld under section 31(1)(g) with subsection (2)(d) as it is information about an individual's fitness to practice. Other than this, section 40(2) has only been applied to the substance of one email. This is an email to Bruce Keogh from a private individual passing on their thoughts on this matter. This is all information which relates to living individuals from which they could be identified. In relation to the information withheld under section 31(1)(g) with subsection 2(d), whilst the individual was not named, the Commissioner considers that he would be identifiable from that information to persons connected to the hospital such as staff and patients.

18. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) of FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that “Personal data shall be processed fairly and lawfully”. Furthermore at least one of the conditions in Schedule 2 should be met. In addition for sensitive personal data at least one of the conditions in Schedule 3 should be met.

### **Likely expectation of the data subject**

19. NHS England has explained that there are a significant number of names and contact details contained within the withheld information. It said that it had however disclosed the names of individuals who were prominent to the issue.
20. The complainant queried why his own name had not been disclosed as well as the name of another particular individual. As stated above the Commissioner considers that the complainant's own name should be redacted under section 40(1) FOIA. NHS England removed the redaction relating to the other name the complainant had queried.
21. The complainant then highlighted 18 emails to NHS England, in relation to which he considered the names had been incorrectly redacted under section 40(2) FOIA. NHS England made a decision to disclose some of the names within this sample. It also wrote to a number of the individuals whose names had been redacted within this sample to gain consent to disclosure. As a result some further redactions were removed. Some individuals did refuse consent and so these redactions have remained in place. One private individual also refused consent to the disclosure of the substance of their email, as well as redacting the name and contact details of this individual, NHS England also redacted the content of this email.
22. In relation to the remaining redactions to names and contact details, NHS England explained that it had made redactions to the names and contact details of employees where they did not occupy senior roles and would not have expected their names to be released. It said that for individuals outside of NHS England, where they were not directly involved in the issue and it was unable to ascertain their role and seniority, these names were redacted as such individuals would not expect their names to be disclosed within this context.
23. Finally, in relation to the information that was originally withheld under section 31(1)(g) with subsection (2)(d), the Commissioner considers that the individual would not have expected issues about their fitness to practice to be disclosed into the public domain whilst investigations were ongoing.

### **The legitimate public interest**

24. NHS England explained that there is a legitimate public interest in disclosure of information relating to concerns about Leeds Teaching Hospitals congenital heart services, as it is a sensitive issue affecting a significant number of people.

25. However it argued that in response to this request it had disclosed the majority of the substance of the correspondence and the names of senior individuals directly involved in the matter, who were responsible and accountable for decisions made. It has also disclosed some further names as set out at paragraphs 16 and 17 above. It said that the disclosures already made went a great way to meet the legitimate public interest and that it would not be fair to disclose the names of more junior staff or individuals outside of NHS England not directly involved in the matter. Nor does it consider it would be fair to disclose the substance of a private individual's email where that individual has expressly refused consent.
26. The Commissioner considers that it would be unfair to disclose the information redacted under section 40(2) by virtue of section 40(3)(a)(i) FOIA. The Commissioner considers that NHS England has spent a significant amount of time, reviewing a voluminous amount of information, to ensure that names of senior individuals directly involved in the decision making process relating to the congenital heart service were disclosed. It has also taken time to gain the consent of the individuals whose names were redacted in the 18 emails highlighted by the complainant. It has disclosed 11 further names as a result of this. The Commissioner also notes that the substance of much of the requested correspondence has been disclosed. The Commissioner accepts NHS England's approach that more junior members of staff and individuals outside of NHS England, not directly involved in this matter, would not expect their names and contact details to be disclosed in this context. He also considers that the legitimate interests of the individual whose fitness to practice has been called into question, outweighs the legitimate interest in disclosure, whilst investigations are ongoing. The Commissioner therefore considers that section 40(2) FOIA was correctly applied to make the remaining redactions under this exemption and should also have been applied to the information originally withheld under section 31(1)(g) with subsection 2(d) FOIA.

## **Section 41**

27. NHS England has applied section 41(1) to withhold the information which relates to comments made in relation to complaints, complainants, patients and their experiences and concerns provided to Fragile Hearts. Patients consented to this information being provided to NHS England but they did not consent to public disclosure.
28. It has also applied this exemption to four emails (numbered 76, 77, 78 and 79) which relate to an external party who has shown an interest in providing services to NHS England in connection with the issues which arose at Leeds Teaching Hospitals NHS Trust.

29. Section 41(1) provides that information is exempt if it was obtained by the public authority from any other person and disclosure would constitute an actionable breach of confidence. This exemption is absolute and therefore not subject to a public interest test.

*Was the information obtained from another person?*

30. The information was provided to NHS England by Fragile Hearts (a support group set up by parents affected by congenital heart care) and therefore clearly constitutes information sent by a third party. The Commissioner therefore accepts the first limb of section 41 is met.
31. In relation to the other four emails described at paragraph 27 above, email 76 and 77 appear to have been written by NHS England staff and were not therefore obtained from another person. Section 41 cannot therefore be applied to these emails and they should be disclosed to the complainant. In relation to email 78 and 79 they were written by external individuals and provided to NHS England so the first limb of section 41 is met.

*Would disclosure constitute an actionable breach of confidence?*

32. In considering whether disclosure of information constitutes an actionable breach of confidence the Commissioner will consider the following:
- Whether the information has the necessary quality of confidence;
  - Whether the information was imparted in circumstances importing an obligation of confidence and
  - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.
33. The Commissioner finds that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
34. NHS England has explained that it considers that information has the necessary quality of confidence for the following reasons:
- i. The information relates to personal information about an experience they or someone known to them has had.
  - ii. The information references concerns which require proper investigation and resolution.

- iii. The information was not provided upon the basis that any of it would be wholly or partially released.
  - iv. The information details events which where appropriate may require proper investigation under the NHS Complaints Regulations.
35. NHS England has confirmed that this information has not been made publicly available and as such it cannot be considered to be otherwise accessible.
36. The Commissioner considers that the information cannot be said to be trivial as it contains sensitive information relating to concerns and individuals' experiences of the congenital heart department at Leeds Hospitals NHS Foundation Trust. The Commissioner is therefore satisfied that the information has the necessary quality of confidence.
37. In relation to email 78 and 79, this does contain fairly detailed information about technology developed by an external body which could potentially be used in the NHS. The Commissioner is therefore similarly satisfied that the information has the necessary quality of confidence.
38. The Commissioner has gone on to consider whether the information was imparted in circumstances importing an obligation of confidence.
39. NHS England has explained that the information was provided to NHS England under an implied duty of confidence as there is an expectation of confidence in relation to concerns, such as this, raised to the authority.
40. The Commissioner accepts that there was an implied duty of confidence under the circumstances of this case in relation to the information provided by parents via Fragile Hearts and the information contained within emails 78 and 79.
41. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. The test under section 41 is whether disclosure would constitute a breach of confidence actionable by the person who provided the information or any other person.
42. In this case, as the withheld information relates to comments made about complaints, complainants, patients and their experiences and concerns, the Commissioner considers that disclosure would be an invasion upon the individuals' privacy and would therefore be detrimental to the individuals who provided the information which was passed to NHS England by Fragile Hearts.



43. In relation to emails 78 and 79, as it contains fairly detailed information about technology that has been developed by an external body, disclosure of this into the public domain would cause detriment to the confider.

*Would a public interest defence be available?*

44. As section 41(1) is an absolute exemption there is no public interest. However, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The duty of confidence public interest test assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence. The Commissioner has therefore gone on to consider whether there would be a defence to a claim for breach of confidence.
45. In taking this approach it is important to consider the consequences of disclosing confidential information in order to properly weigh the public interest in preserving the confidence against the public interest in disclosure. People would be discouraged from confiding in public authorities if they did not have a degree of certainty that such confidences would be respected and not easily overridden.
46. NHS England considers that there is a public interest in transparency relating to the decision making and handling processes surrounding the concerns about the congenital heart services at Leeds Teaching Hospitals NHS Trust. It also said that there is a public interest in enabling public scrutiny regarding its investigative powers, handling and processes.
47. The Commissioner considers there is a strong public interest in disclosure of information relating to this issue due to the significant impact of the decision made. The Commissioner also recognises the wider public interest in preserving the principle of confidentiality.
48. Conversely NHS England argued that it has a duty to maintain confidence where there is a quality of confidence, express or implied. It said that to override this puts information provided to NHS England at risk and risks individuals' and organisations' alike from providing NHS England full information regarding their services.
49. The Commissioner considers that there is a public interest in not disclosing information which would contravene the confiders' privacy in being able to share individual concerns with NHS England without having the substance of those concerns disclosed into the public domain.

50. It also considers that there is a public interest in not disclosing technical information, shared with NHS England which may be able to be used to improve quality and performance as external bodies may become less willing to share such confidential information in the future.
51. Having reviewed the information and the arguments put forward by NHS England, the Commissioner has concluded that there is a strong public interest in maintaining the obligation of confidence. The Commissioner therefore considers the public interest in maintaining the duty of confidence outweighs the public interest in disclosure in this case.
52. Therefore the Commissioner finds that section 41 FOIA was correctly applied in this case to all information it has been applied to other than emails 76 and 77 and in relation to information where section 40(2) FOIA has already been upheld.

## Right of appeal

---

53. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

54. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
55. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**